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IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1961.

FANNIE ALEXANDER and MARIE WALKER,
Petitioners,

vs.

PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

Fannie Alexander and Marie Walker, petitioners, pray that a writ of certiorari issue from this court to review a judgment of the Supreme Court of Illinois.

CITATIONS TO OPINION BELOW.

The opinion, reported in 21 Ill. 2d 347, 172 NE 2d 785, is printed in Appendix hereto, *infra,* pages 9 to 14.

JURISDICTION.

The judgment of the Supreme Court of Illinois was entered March 27, 1961, on denial of petition for rehear-

ing (R. 19).(1) By a timely application, Mr. Justice Clark allowed petitioners until August 9, 1961 to file their petition for writ of certiorari.

Jurisdiction of this court is invoked under 28 U.S.C.A., Section 1257 (3). The federal constitutional questions which are presented for review were raised in the trial court by a timely motion to suppress evidence (R. 3: 4-9).

Rulings of the trial court rejecting petitioners' federal constitutional claims were preserved and presented to the Supreme Court of Illinois for review. The Supreme Court passed specifically on the federal constitutional questions. (R. 11-14). Appendix p. 14.

In its opinion, the Supreme Court of Illinois sustained petitioners' claim that in the consolidated trial there was admitted evidence obtained from an illegal and unreasonable search and seizure. (R. 13-14). Appendix pp. 12-13. However, the court rejected petitioners' claim that the illegal evidence affected the entire consolidated trial and reversed one of the convictions, but affirmed two of the convictions entered in the consolidated trial of petitioners

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(1) The record in this case consists of a Certified Transcript which includes, in printed form, the abstract of the trial court proceedings, the brief of petitioners, the brief of respondent, petitioners' reply brief and petition for re-hearing. The printed abstract appears on page 3; the brief of petitioners on page 5; the brief of respondent on page 7; petitioners' reply brief on page 9; and the petition for rehearing on page 18.

References to these printed items in the Transcript will be made thus: to the trial court proceedings, for example, (R. 3: 4-9), indicating reference to pages 4 to 9 of the printed abstract which is page 3 of the Transcript.

wherein evidence obtained by illegal and unreasonable search was admitted. (R. 13-14). Appendix p. 14.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED.

1. The constitutional provisions involved are the portions of the 14th Amendment, Section 1, as follows:

> "* * * nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws * * *"

2. The statutory provisions involved are Ill. Rev. Stat. 1959, Ch. 38, Secs. 192.28-1, 192.28-2.17, 192.28-3, and 192-28-38. They are printed in Appendix B, *infra*, pages 15 to 16.

QUESTION PRESENTED.

1. Whether petitioners were denied due process of law when they were found guilty of charges contained in three indictments which were consolidated for one trial, and where the trial judge, without expressly limiting the application of the evidence to any one of the three indictments, admitted evidence which the Supreme Court of Illinois found was obtained by an illegal and unreasonable search and seizure.

2. Whether a rule of law in the form of a presumption by which the Supreme Court of Illinois determines the propriety of evidence considered by a trial judge precludes application to this case of the constitutional doctrine declared by the Supreme Court of the United States in *Mapp* v. *Ohio*.

STATEMENT.

In September, 1959, petitioners, Fannie Alexander and Marie Walker, who are sisters, were indicted in three separate indictments by the grand jury of Cook County, Illinois. (R. 3: 1-3). In two indictments, Fannie Alexander and Marie Walker, together with a man named Bo Handsborough, were jointly charged with the crimes of conspiracy to sell, and with the sale and possession of narcotics. (R. 11). In the other indictment, Marie Walker, alone, was charged with possession of heroin. (R. 11).

When the three cases came for trial, Marie Walker filed a motion to suppress in each indictment, alleging that on the 17th day of September, 1959, her home was subjected to an illegal and unreasonable search and seizure. (R. 3: 4-5). As a matter of fact, the illegal search of Mrs. Walker's home was accomplished when federal agents served on her a warrant issued by a complaint arising out of the alleged sale of narcotics charged in the other two indictments. (R. 3: 6, 13). Mrs. Walker claimed that the illegally seized evidence was going to be offered as part of the prosecution's proof of allegations contained in the three indictments. (R. 3: 4-5). Indeed, the search of Mrs. Walker's home was conducted by federal agents who were seeking evidence related to the allegations in the two indictments charging sale and conspiracy to sell narcotics. (R. 3: 13, 15).

Hearing was had on the motion to suppress (R. 3: 6); and the motion was denied (R. 3: 8-9). Thereupon, petitioners waived trial by jury. On motion of the court, the causes were consolidated. The trial judge expressly ruled that the "* * * Motion to Suppress to stand as to each indictment * * *" (R. 3: 9).

The prosecution did not indicate any order of proof; and, without limiting the applicability of the evidence to any one of the three indictments, the trial judge, without a jury, heard all of the evidence against the petitioners.

All of the witnesses for the prosecution, except one (R. 3: 17-25), were federal agents who conducted surveillance and allegedly participated in the purchase of narcotics charged in two of the indictments. One witness, a chemist of the United States Treasury (R. 3: 27-28), testified that he examined the evidence taken in the illegal search of Marie Walker's home (R. 3: 4-5, 27-28). At the conclusion of his testimony the trial judge, in an obvious reference to the indictments which charged sale of narcotics, asked him, "Did you recover any of the marked money?" The Assistant State's Attorney answered, "No, Your Honor." (R. 3: 28)

Another witness, a federal narcotics agent, testified that he made surveillance of the sale of narcotics alleged in one of the indictments charging sale of heroin. Then as part of his direct testimony, this witness testified that he took part in the illegal search of Marie Walker's home (R. 3: 28-29). On cross examination, this same witness testified to facts alleged in each of the three indictments (R. 3: 29-30).

Petitioners testified in their defense; and at the conclusion of the case the court, after expressing dissatisfaction with the quality of evidence offered by the prosecution "* * * This isn't a strong case * * *" (R. 3: 33), entered findings of guilty in each indictment imposing sentences of one to five years, two to ten years and ten years to one day, respectively. (R. 3: 33-34).

By one writ of error, since "* * * the crimes with which defendants were charged in the three indictments were related to each other, * * *" the Supreme Court of Illinois reviewed the convictions and sentences of petitioners. Petitioners joined in the federal claim that admission of evidence obtained in an unreasonable search affected the entire consolidated trial, and invalidated the three convictions. The federal constitutional questions raised were expressly passed upon by the Supreme Court of Illinois. (R. 13-14).

The Supreme Court sustained the claim of petitioners that in the consolidated trial of the three indictments there was admitted evidence which was obtained by an illegal and unreasonable search and seizure (R. 11-14). However, the court reversed only the conviction of Marie Walker for possession of the narcotics illegally seized. As to the other two convictions the court affirmed, saying, "* * * In announcing his finding of guilty, the trial judge * * * did not refer to the evidence of the seized narcotics, and the presumption is that he did not consider this evidence, since in a trial by the court without a jury, the trial judge is presumed to have considered only competent evidence * * *" (R. 11-14).

REASONS FOR GRANTING THE WRIT.

1. Illinois' highest court has found that in the consolidated trial which resulted in petitioners' conviction, evidence obtained by an illegal and unreasonable search and seizure was admitted by the trial court sitting without a jury. *People* v. *Alexander*, 21 Ill. 2d 347, 172 N.E. 2d 785. The three indictments charged crimes so "* * * related to each other * * *" that the factual and legal questions could be reviewed as one case. (R. 11); Appendix p. 9.

Mapp v. *Ohio*, 367 U.S. 643, holds that "* * * all evidence obtained by searches and seizure in violation of the Constitution is, by the same authority, inadmissible in a state court."

2. Clearly, it was the *admission in evidence* of "* * * the fruits of an unconstitutional search * * *" which denied petitioners due process of law under the Fourteenth Amendment. *Mapp* v. *Ohio*, 367 U.S. 643. Neither presumptions under the laws of Illinois nor rules of evidence under the state law can operate to deprive petitioners of the force of the constitutional protection pronounced in Mapp v. Ohio. *Rogers* v. *Richmond*, 365 U.S. 534; *Manley* v. *State of Georgia*, 279 U.S. 1; *Bailey* v. *Alabama*, 219 U.S. 219.

3. Despite the fact that Illinois' highest court found that evidence obtained by an unlawful search and seizure was admitted in evidence at petitioners' trial, convictions of petitioners in two of the indictments were affirmed on the dubious ground that the trial judge "* * * did not refer to the evidence of the seized narcotics, and the presumption is that he did not consider this evidence * * *" (R. 14).

This conclusion of the Supreme Court of Illinois presents for review by this court's certiorari jurisdiction the important question whether the law of evidence of a state precludes application of the constitutional protection proclaimed in *Mapp* v. *Ohio*. Consolidated trials are frequent in state courts. The questions presented here are crucial to the administration of criminal justice and uniformity in application of constitutional doctrines declared by this court.

In the analogous area of extorted evidence, this court has said that:

> "* * * nothing could be more certain than that when a coerced confession is involved, 'the relevant rules of evidence' are overridden without regard to 'the incidence of such conduct by the police,' slight or frequent. Why should not the same rule apply to what is tantamount to coerced testimony by way of unconstitutional seizure of goods, papers, effects, documents, etc.? * * *"

Rogers v. *Richmond*, 365 U.S. 534; *Mapp* v. *Ohio*, 367 U.S. 643.

From a constitutional perspective, a trial judge's mind cannot be dissected so as to determine the extent of consideration given an inadmissible confession. *Lee* v. *Mississippi*, 332 U.S. 742; *Brown* v. *Allen*, 344 U.S. 443; *Payne* v. *Arkansas*, 356 U.S. 560. This task is not made easier when the prejudicial evidence are " * * * the fruits of an unconstitutional search * * *" *Mapp* v. *Ohio*, 367 U.S. 643. Furthermore, in this case the crucial test in determining whether petitioners were denied due process is not whether the trial judge considered " * * * the evidence of the seized narcotics * * *" The crucial test is whether there was admitted in petitioners' trial illegal evidence which were "* * * the fruits of an unconstitutional search * * *" *Mapp* v. *Ohio*, 367 U.S. 643. Importance of these constitutional questions requires certiorari review by this court.

CONCLUSION.

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

GEORGE N. LEIGHTON,
ROBERT L. TUCKER,
Counsel for Petitioners.

Dated: August 3, 1961.

APPENDIX A.

Docket No. 36061—Agenda 15—November, 1960.

The People of the State of Illinois, Defendant in Error, v. Fannie Alexander *et al.*, Plaintiffs in Error.

Mr. JUSTICE KLINGBIEL delivered the opinion of the court:

The defendants, Fannie Alexander and Marie Walker, were tried in the criminal court of Cook County by the court without a jury on three separate indictments. In two of these indictments the defendants were jointly charged, together with one Bo Handsborough, with the crimes of conspiracy to sell narcotics and the sale of narcotics. In the third indictment the defendant Marie Walker was charged with possession of narcotics. The indictments were nolled as to Handsborough and were then consolidated for trial, and each defendant was found guilty under each indictment. A writ of error has been issued from this court to review the judgments of conviction. While under normal circumstances the practice of obtaining review of separate judgments of conviction by a single writ of error is not permitted, the practice has been sanctioned by this court. (*People* v. *De Cola*, 15 Ill. 2d 527.) We find in the present case that the crimes with which the defendants were charged in the three indictments were related to each other and we are of the opinion that an orderly administration of justice permits the review of the three convictions on a single writ of error.

Defendants contend that the evidence was insufficient to establish their guilt and that there was a variance between the indictments and the proof. The defendant Walker contends that evidence obtained through an unlawful search was admitted in evidence on the indictment in which she was charged with unlawful possession of narcotics. We

shall first consider the contention that the evidence failed to establish the guilt of the defendants in the conspiracy case and in the sale of narcotics case.

A Federal agent, Dennis Dayle, testified that in the morning of July 8, 1959, he had a conversation with Bo Handsborough and gave him $415. About two hours later Handsborough returned with some narcotics and Dayle paid him an additional $85 and received the narcotics from Handsborough. Handsborough testified that on July 8, he was acquainted with Dayle, but did not know that he was a narcotics agent. Dayle on that date gave him $415 with which to buy narcotics and he went to Fannie Alexander's residence and said that he had come for some dope for a friend of his. Fannie told him that the price would be $500 and told him to go to Marie Walker's house to get the dope. He testified that he gave Fannie Alexander $500 and went to Marie's house. She told him that Fannie had called her and told her that Bo was coming and she gave him a quantity of narcotics which he took back to Dayle. Bo told Dayle that the narcotics cost $500 and Dayle gave him $85 more. There was some further testimony as to later transactions between Handsborough and Dayle in which Handsborough attempted to buy more narcotics for Dayle. Inasmuch as the sale and conspiracy indictments alleged a sale on July 8, we are of the opinion that this evidence should not be considered.

Each of the defendants testified in her own defense. Fannie Alexander denied that she ever received any money from Handsborough for the purposes of supplying him or anybody else with narcotics. She testified that Handsborough did call her one morning and tell her that he had some money and wanted to get some heroin but she told

him not to talk to her about narcotics. Marie Walker denied ever furnishing narcotics to Bo Handsborough.

At the conclusion of all the evidence the trial judge stated that the case did not have the corroboration that he would like to see in a narcotics case but that he felt that there was ample evidence to show that the defendants were conspiring with Handsborough to sell narcotics. The judge stated that he was satisfied with the testimony of Handsborough even though it was not corroborated as much as he would like.

The defendants contend that the evidence fails to show a sale by defendant to Dayle and contend that, at the most, the evidence shows a sale to Handsborough. The same argument is advanced in support of the charge that there is a variance between the indictments, which allege a conspiracy to sell and a sale to Dayle. This argument ignores the realities of the situation. It is true that the evidence showed that Handsborough gave the money to Mrs. Alexander and that Mrs. Walker gave the narcotics to Handsborough. However, the evidence is also clear that Dayle had given Handsborough the money to buy narcotics for him and both of the defendants knew that Handsborough was buying the narcotics for someone else. Therefore, if the testimony of Dayle and Handsborough was believed by the trial judge, there was sufficient evidence to show a conspiracy to sell narcotics and a sale of narcotics by the defendants to Dayle, and the fact that the sale was made through Handsborough is immaterial.

Defendants argue that the testimony of Handsborough is not worthy of belief since he was an accomplice in the transaction. The defendants also contend that the fact that the indictments against Handsborough were nolle prossed shows that his testimony was influenced by a promise of

leniency. While the testimony of an accomplice must be scrutinized with caution, the uncorroborated testimony of an accomplice is sufficient to convict. (*People* v. *Williams*, 19 Ill. 2d 171.) Handsborough testified that he was not promised leniency by the State, but admitted that Dayle had told him that he would get a break. Another narcotics agent testified that no promise of leniency was ever made to Handsborough. However, even if such a promise had been made, this would go only to the credibility of Handsborough's testimony. The trial judge expressly stated that he believed Handsborough, and his determination as to the credibility of his testimony will not be disturbed by this court. We are of the opinion that the evidence was sufficient to establish that the defendants were guilty of conspiring to sell narcotics to Dayle and of selling narcotics to him.

This leaves for consideration the conviction of the defendant Walker on the charge of possession of narcotics. In September, 1959, Federal narcotics agents arrested the defendant Walker in her apartment under authority of a warrant issued by the municipal court of Chicago. They had no search warrant. After the defendant was placed under arrest seven narcotics agents undertook a complete search of the defendant's apartment. They searched every portion of every room in the apartment and finally ripped up some linoleum on the floor of a closet and ripped up some boards in the floor and found the narcotics. These narcotics were introduced in evidence at the trial and were the principal evidence against the defendant Walker on the charge of possession of narcotics. Said defendant contends that the Federal agents had no authority to arrest her because their authority only extended to the execution of Federal warrants and that they had no authority to act under the State warrant issued by the municipal court. Defendant further

contends that even if the arrest was legal, the search was not a lawful incident to the arrest. We do not find it necessary to consider whether the agents had authority to arrest the defendant, for we are of the opinion that regardless of the legality of the arrest the search of the apartment was illegal. An officer making a lawful arrest has the right to search the person arrested and this right of search may in proper cases extend beyond the person to an area in immediate physical relation to him. (*People* v. *Tillman*, 1 Ill. 2d 525.) However, this right of incidental search extends only to such a search as is reasonably necessary to protect the officers from attack, to prevent the escape of the prisoner, or to discover the fruits of the crime and does not justify the arresting officer in searching an entire home without first obtaining a search warrant. (*People* v. *Burnett*, No. 36059, Nov. Term, 1960; *People* v. *Kalpak*, 10 Ill. 2d 411.) The search here was far more extensive than the limited search which is permissible as an incident to a lawful arrest and the narcotics which were found as a result of the search should not have been admitted in evidence. Since the only evidence tending to establish the guilt of the defendant Walker of the charge of unlawful possession of narcotics was obtained through an illegal search, the judgment of conviction on that charge must be reversed.

Finally, the defendants contend that the erroneous admission in evidence of the illegally seized narcotics requires reversal of the sale and conspiracy convictions as well as the conviction on the charge of possession. They argue that the trial judge considered this evidence as evidence against the defendants in the sale and conspiracy cases, and that defendants were thereby prejudiced. Aside from the question of the illegal search, the narcotics which were found in Marie Walker's apartment in September were not admis-

sible as evidence in the conspiracy and sale cases, for these crimes took place two months earlier. If the trial judge did consider this evidence in the sale and conspiracy cases, there would be some force to defendant's argument. However, there is nothing in the record to indicate that this evidence was considered in these cases. In announcing his finding of guilty, the trial judge stated that he believed the testimony of Handsborough, which showed that the defendants were guilty of a conspiracy and a sale. He did not refer to the evidence of the seized narcotics, and the presumption is that he did not consider this evidence, since in a trial by the court without a jury, the trial judge is presumed to have considered only competent evidence. *People* v. *Grodkiewicz*, 16 Ill. 2d 192; *People* v. *Burts*, 13 Ill. 2d 36.

For the reasons stated in this opinion the judgments of conviction in the sale and conspiracy cases are affirmed and the judgment of conviction as to the defendant Marie Walker on the possession charge is reversed.

Affirmed in part and reversed in part.

APPENDIX B.

§ 192.28-1 Title of act

This Act shall be known and may be cited as the "Uniform Narcotic Drug Act". 1957, July 11, Laws 1957, p. 2569, § 1.

§ 192.28-2.17

(d) "Opium" includes morphine, codeine, and heroin, and any compound, manufacture, salt, derivative, mixture, or preparation of opium, but does not include apomorphine or any of its salts.

§ 192.28-3 Violation

It is unlawful for any person to manufacture, possess, have under his control, sell, prescribe, administer, dispense or compound any narcotic drug, except as authorized in this Act. No person shall unlawfully use, or be under the influence of or be addicted to the unlawful use of narcotic drugs. 1957, July 11, Laws 1957, p. 2569, § 3, as amended 1959, July 22, Laws 1959 p. 1893, § 1.

§ 192.28-38 Penalties

Whoever agrees, consents or in any manner offers to unlawfully sell, prescribe, administer, transport, dispense or give any narcotic drugs to any person, or offers, arranges, or negotiates to have any narcotic drugs unlawfully sold, prescribed, administered, transported, dispensed or given, and then sells, prescribes, administers, transports, dispenses or gives, or offers, arranges or negotiates to have sold, delivered, transported, furnished, administered, dispensed or given to any person any non-narcotic liquid, substance or material shall be imprisoned in the penitentiary for any term from 1 year to 10 years.

(Appendix)

Whoever violates this Act by traffic in, selling, prescribed, administering, or dispensing any narcotic drugs, shall be imprisoned in the penitentiary for any term from 10 years to life, and for any subsequent offense shall be imprisoned in the penitentiary for life. Any offense under this Act is a subsequent offense if the violator has been previously convicted of an offense under this Act or any previous Act of this State relating to narcotic drugs or of a felony under any law of the United States or of the District of Columbia relating to narcotic drugs. No probation or suspension of sentence shall be granted to any violator convicted under this paragraph. * * *

Whoever violates this Act by possessing, having under his control, manufacturing, or compounding any narcotic drug shall be fined for the first offense not more than $5,000 and be imprisoned in the penitentiary for a period of not less than 2 years or more than 10 years. For any subsequent offense the violator shall be imprisoned in the penitentiary for any term from 5 years to life. Any offense under this Act is a subsequent offense if the violator has been previously convicted of an offense under this Act or any previous Act of this State relating to narcotic drugs or of a felony under any law of the United States or of the District of Columbia relating to narcotic drugs. No probation or suspension of sentence shall be granted to any violator who has been convicted of any subsequent offense.